Supreme Court, U.S.
FILED
AUG 21 2006
OFFICE OF THE CLERK

Nos. 06-82, 06-84, 06-100, and 06-101

IN THE

Supreme Court of the United States

HARTFORD FIRE INS. CO.,

Petitioner,

v.

JASON RAY REYNOLDS,

Respondent.

[Captions continued on inside cover]

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE MORTGAGE INSURANCE COMPANIES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

THOMAS M. HEFFERON
Counsel of Record
RICHARD M. WYNER
JOSEPH F. YENOUSKAS
GOODWIN | PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
Tel: 202-346-4000
Counsel for *Amicus Curiae*

August 21, 2006

[Captions continued from outside cover]

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

STATE FARM MUT. AUTO. INS. CO., ET AL.,
Petitioners,

v.

JULIE WILLES,
Respondent.

SAFECO INS. CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

ARGUMENT 3

I. THE DECISION BELOW WILL HAVE IMPACTS FAR BEYOND THE PARTICULAR CIRCUMSTANCES OF THESE CASES, INCLUDING ON THE MORTGAGE INSURANCE INDUSTRY 4

A. FCRA Affects Much of the Economy 5

B. The Ninth Circuit's Willfulness Ruling Is Likely To Have an Impact on all of the Act's Substantive Provisions 6

II. THE NINTH CIRCUIT'S DIVERGENT AND ERRONEOUS DECISION WILL CAUSE PROBLEMS ACROSS THE BROAD SWEEP OF ITS IMPACT 8

A. The Circuit Split Created by the Ninth Circuit Will Result in Forum Shopping and More Litigation, Skew Compliance, and Undermine the Attorney-Client Privilege 8

B. These Adverse Effects Will Be Particularly Pronounced Because FCRA Is a Complex Statute that Raises many Unresolved Issues 11

C. These Pronounced Adverse Effects Are Especially Problematic Because the Efficient Flow of Consumer Information Is Vital to the Economy, Including the Housing Industry 14

III. THE NINTH CIRCUIT'S ERRONEOUS "ADVERSE ACTION" RULINGS FURTHER WARRANT REVIEW 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES:

Ladner v. Equifax Credit Info. Servs., Inc., 828 F. Supp. 427 (S.D. Miss. 1993) 9

Mark v. Valley Ins. Co., 275 F. Supp. 2d 1307 (D. Or. 2003) 12

Murray v. GMAC Mortgage Corp., 434 F.3d 948 (7th Cir. 2006) 7

Pearson v. Novastar Home Mortgage, Inc., No. 05-1377-A, 2006 U.S. Dist. LEXIS 36282 (M.D. La. Mar. 28, 2006) 7

Putkowski v. Irwin Home Equity Corp., 423 F. Supp. 2d 1053 (N.D. Cal. 2006) 7

Reynolds v. Hartford Fin. Servs. Group, Inc., 435 F.3d 1081 (9th Cir. 2006) ..... *passim*

Skwira v. United States, 344 F.3d 64 (1st Cir. 2003), *cert. denied*, 542 U.S. 903 (2004) 11

Stergiopoulos v. First Midwest Bancorp, Inc., 427 F.3d 1043 (7th Cir. 2005) 9

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 14

Upjohn Co. v. United States, 449 U.S. 383 (1981) 10

Verex Assurance, Inc. v. Palma,
519 U.S. 1048 (1996) 1

Whitfield v. Radian Guar., Inc.,
395 F. Supp. 2d 234 (E.D. Pa. 2005),
appeal pending, No. 05-5017 (3d Cir.) 13

Yang v. GEICO, 146 F.3d 1320
(11th Cir. 1998) 7

STATUTES:

Fair and Accurate Credit Transactions Act of 2003,
Pub. L. No. 108-159 12

Fair Credit Reporting Act ..... *passim*

15 U.S.C. § 1681(a)(1) 14
15 U.S.C. § 1681(a)(3) 14
15 U.S.C. § 1681a(d)(1) 6–7
15 U.S.C. § 1681a(k) 11, 12–13
15 U.S.C. § 1681a(k)(1)(A) 13
15 U.S.C. § 1681a(k)(1)(B)(i) 13, 17
15 U.S.C. § 1681b 5, 6, 7, 15
15 U.S.C. § 1681c 6
15 U.S.C. § 1681g 6
15 U.S.C. § 1681i 6
15 U.S.C. § 1681m 5, 6, 16
15 U.S.C. § 1681m(a) 17
15 U.S.C. § 1681n 3, 7, 11
15 U.S.C. § 1681n(a) 7
15 U.S.C. § 1681s(a)(1) 12
15 U.S.C. § 1681s-2 ..... 5, 15
15 U.S.C. § 1681s-2(b) 6
15 U.S.C. § 1681s-2(c) 7
15 U.S.C. § 1681t(b) 15
15 U.S.C. § 1681v 5

RULES AND REGULATIONS:

16 C.F.R. pt. 698, app. H, § I.C 13

65 Fed. Reg. 80,802 (Dec. 22, 2000) 12

LEGISLATIVE HISTORY:

H.R. Rep. No. 108-263 (2003) 15

S. Rep. No. 103-209 (1993) 5, 9

S. Rep. No. 104-185 (1995) 14

S. Rep. No. 108-166 (2003) 5

OTHER AUTHORITIES:

Robert B. Avery et al., An Overview of Consumer Data and Credit Reporting, Federal Reserve Bulletin (Feb. 2003), *available at* http://www.federalreserve.gov/pubs/bulletin/2003/0203lead.pdf 14

Federal Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 (Dec. 2004), *available at* http://www.ftc.gov/reports/facta/041209factrpt.pdf ... 15

FTC Staff Letter from Clarke W. Brinckerhoff to Paul H. Schieber (Mar. 3, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/schieber.htm 13

FTC Staff Letter from William Haynes to Matthew B. Halpern (June 11, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/halpern.htm..... 7

U.S. Gen. Accounting Office, GAO Report No. 06-435, Mortgage Financing: HUD Could Realize Additional Benefits from its Mortgage Scorecard (Apr. 2006) 5

INTEREST OF THE *AMICUS CURIAE* [1]

The Mortgage Insurance Companies of America ("MICA") is a non-profit trade association that represents the private mortgage insurance industry in the United States. Its members are United Guaranty Corporation, Genworth Mortgage Insurance Corporation, Mortgage Guaranty Insurance Corporation, PMI Mortgage Insurance Co., Republic Mortgage Insurance Co., and Triad Guaranty Insurance Corporation.

MICA's members provide private mortgage insurance to mortgage lenders. Mortgage insurance protects a lender if the homeowner defaults on the loan. It allows those lenders to make low-downpayment loans, thereby expanding homeownership opportunities and enabling millions of Americans to become homeowners. Taken together, the private mortgage industry's seven companies insure over five million mortgages nationwide.[2]

MICA works to enhance understanding of the vital role that private mortgage insurance plays in housing Americans and of the issues faced by the mortgage insurance industry. Among MICA's missions is providing information to decisionmakers on issues concerning the obligations of companies that provide mortgage insurance. As such, MICA participates as *amicus curiae* in cases that may substantially affect such companies. See, *e.g.*, *Verex Assurance, Inc. v. Palma*, 519 U.S. 1048 (1996) (granting MICA's motion for leave to file an *amicus curiae* brief).

---

[1] Written consents of all parties have been filed with the Clerk. This brief was authored solely by counsel for MICA, and no person or entity other than MICA, its members, or its counsel made any monetary contribution to the preparation or submission of the brief.

[2] The seventh company, Radian Guaranty Co., is not currently a member of MICA.

Mortgage insurers write policies with premium terms that may vary based on, among other things, information about the potential homeowner's creditworthiness. As a result, MICA's members have a strong interest in having this Court immediately review and correct the Ninth Circuit's decision for three reasons.

First, each of MICA's members has recently been sued in putative class actions arising under the Fair Credit Reporting Act ("FCRA") in which the plaintiffs allege, *inter alia*, that the mortgage insurers willfully violated FCRA by not providing notices of adverse action when the mortgage insurance policy premiums were affected by the borrowers' credit scores.[3] The Ninth Circuit's decision addresses issues that are also raised by those lawsuits, including the proper standard for determining whether any FCRA violation was willful, thus subjecting the defendant to punitive sanctions. Indeed, shortly after the Ninth Circuit's initial opinion was issued, it was cited by the plaintiffs in two of the cases pending against private mortgage insurers.[4]

---

[3] See *Glatt v. PMI Group, Inc.*, No. 2:03-CV-00326-JES (M.D. Fla.); *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky.); *Preston v. Mortgage Guar. Ins. Corp. of Milwaukee*, No. 5:03-CV-111-Oc-10GRJ (M.D. Fla.); *Price v. United Guar. Residential Ins. Co.*, No. 3:03-CV-2643-R (N.D. Tex.); *Portis v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-300 (N.D. Ill.); *Karwo v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-1944 (N.D. Ill.); *Brantley v. Republic Mortgage Ins. Corp.*, No. 04-CV-805 (D.S.C.). In addition, a similar case is pending against Radian. *Whitfield v. Radian Guar. Co.*, No. 05-5017 (3d Cir.).

[4] See Plaintiff's Notice of Supplemental Authority, filed in *Whitfield v. Radian Guar., Inc.*, No. 04-111 (E.D. Pa. Aug. 11, 2005); Plaintiff's Notice of Supplemental Authority in Opposition to Triad's Motion for Summary Judgment, filed in *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky. Aug. 19, 2005).

Second, because the decision below conflicts with prior decisions from other Circuits, review is necessary to prevent forum shopping in future cases involving MICA's members. Mortgage insurers write policies covering properties located across the country, thereby raising a grave risk of forum shopping if the circuit split demonstrated in the petitions is allowed to persist.

Finally, beyond its effects on litigation, the Ninth Circuit's ruling would cause substantial harm to the private mortgage insurance industry and American homeownership. As explained below, the decision affects all aspects of FCRA, not just issues relating to adverse action notices, and will pressure mortgage insurers to consider adopting overly cautious practices in order to avoid the risk of punitive damages. The inevitable result of unnecessarily conservative approaches will be a restricted flow of consumer information, higher costs, and a decreased availability of risk-based priced mortgage insurance.[5]

ARGUMENT

The petitions in these cases correctly demonstrate that the Ninth Circuit's ruling both directly conflicts with decisions of numerous other courts of appeal and is patently wrong as a matter of statutory construction. The Ninth Circuit incorrectly construed the word "willfully" in 15 U.S.C. § 1681n as permitting an award of statutory and punitive damages whenever an appellate court concludes in hindsight that the defendant's position on an issue of first impression was "implausible," even if it was informed by legal advice about this complex statute.

As we now show, immediate correction of that idiosyncratic and erroneous ruling is vitally important. First, as

---

[5] MICA respectfully reserves its members' rights to argue, at an appropriate time and in an appropriate context or forum, the application of the Ninth Circuit's opinion to a particular set of facts.

we show in Part I, the Ninth Circuit's decision will impact a wide swath of the economy, extending far beyond the circumstances of the individual cases before the Court. Although these cases primarily involve the adverse action notice requirements in the context of automobile insurance, the decision below will affect compliance with all of FCRA's substantive provisions by a broad array of industries. Second, as we show in Part II, the Ninth Circuit's ruling will immediately cause serious problems across the wide sweep of its impact. It will increase litigation and promote forum shopping in class actions against companies with multistate operations, like MICA's members; it will unduly pressure companies using consumer information in all of those nationwide operations, thus raising costs and effectively nullifying the contrary decisions of the other Circuit courts that have correctly interpreted the law; and it will inappropriately undermine the attorney-client privilege. These effects will be particularly pronounced because FCRA is a complex statute with numerous unresolved issues, each of which will be directly affected by the Ninth Circuit's ruling that "implausible" answers to unresolved issues can merit an award of punitive damages. Finally, these many adverse effects will be particularly problematic because, as Congress determined in enacting FCRA, the efficient flow of consumer information and the balancing of consumer and industry interests is of vital importance to the American economy.

I. THE DECISION BELOW WILL HAVE IMPACTS FAR BEYOND THE PARTICULAR CIRCUMSTANCES OF THESE CASES, INCLUDING ON THE MORTGAGE INSURANCE INDUSTRY

The cases before the Court primarily involve an alleged failure to comply with FCRA's adverse action notice requirement in the context of automobile insurance sales. But the Ninth Circuit's eccentric and wrongheaded articu-

lation of the standard for what constitutes a "willful" violation of FCRA will, absent correction, both affect numerous other industries, including mortgage insurance, and impact compliance with all of the Act's requirements, not only the giving of adverse action notices in the context of the use under certain circumstances of credit scores.

A. FCRA Affects Much of the Economy

FCRA affects a wide array of businesses. It imposes obligations not only on consumer reporting agencies (15 U.S.C. §§ 1681b, 1681v), but also on companies that furnish information to consumer reporting agencies (*id.* § 1681s-2) and, in certain circumstances, on users of information contained in consumer reports (*id.* § 1681m). Thus, although petitioners in these cases primarily are personal lines automobile insurers, the Ninth Circuit's interpretation of FCRA will impact many other segments of the economy. Indeed, as a general matter, retailers, employers, and government agencies each use consumer information for various purposes.[6]

The same is true throughout the housing industry. First, insurance companies that write homeowner's insurance policies frequently use the homeowner's credit scores in determining the premiums for such insurance.[7] Second, most companies that make mortgage loans use the homeowners' credit information in underwriting the risks of mortgage loans and determining the interest rates and other terms for those loans.[8] Finally, credit information may also be used in connection with the private mortgage insurance issued by MICA's members. Mortgage insurance policies are issued to

---

[6] S. Rep. No. 103-209, at 1–2 (1993).

[7] See, *e.g.*, S. Rep. No. 108-166, at 7 (2003).

[8] *Id.*; see also U.S. Gen. Accounting Office, GAO Report No. 06-435, Mortgage Financing: HUD Could Realize Additional Benefits from its Mortgage Scorecard 5 (Apr. 2006) (discussing use of automated underwriting of loans using borrower credit scores).

mortgage lenders to protect them against the risk of payment defaults by the homeowners. The premium charged to the lender by the mortgage insurer is based on a variety of factors, including, in certain types of mortgage insurance policies, information contained in the homeowners' consumer reports. Indeed, as cited above, MICA's members are defendants in putative class actions alleging that they use consumer information and have disclosure duties under 15 U.S.C. § 1681m.

B. The Ninth Circuit's Willfulness Ruling Is Likely To Have an Impact on all of the Act's Substantive Provisions

FCRA imposes a variety of substantive duties beyond the adverse action notice provisions that the Ninth Circuit considered. For example, section 1681b sets forth permissible purposes for which consumer reporting agencies may furnish, and third parties may receive, consumer report information. 15 U.S.C. § 1681b. Sections 1681c, 1681g, and 1681i impose requirements with respect to the types of information that a consumer reporting agency may include in a consumer report, how consumer reporting agencies must disclose such information to consumers, and how disputes over accuracy are resolved by such agencies and by information furnishers. *Id.* §§ 1681c, 1681g & 1681i. Section 1681m imposes duties on users of information in consumer reports in certain circumstances. *Id.* § 1681m. And section 1681s-2(b) provides procedures for investigations by entities that furnish consumer information into certain disputes over the accuracy of consumer information. *Id.* § 1681s-2(b).

Moreover, the Act's provisions are not limited to the use of credit information, which was at issue in these cases. The duties under FCRA arise from use of information in consumer report[s], a term that Congress defined to include not only credit information, but also "any information * * * bear-

ing on a consumer's * * * character, general reputation, personal characteristics, or mode of living." *Id.* § 1681a(d)(1). That definition has been construed to include such data as driving record information,[9] social security numbers, and even nicknames.[10]

With some exceptions where private suits are barred (*e.g.*, *id.* § 1681s-2(c)), FCRA authorizes an award of statutory and punitive damages against "[a]ny person who willfully fails to comply with *any* requirement imposed under this subchapter." *Id.* § 1681n(a) (emphasis added). Thus, the Ninth Circuit's interpretation of the word "willfully" may affect compliance with, and lawsuits involving, a large number of FCRA's requirements. There are, for example, dozens of lawsuits now pending in which plaintiffs are seeking punitive damages on the ground that creditors and insurers did not make firm offers of credit or insurance when they sent out so-called "prescreened" solicitations to consumers, and thus allegedly violated FCRA restrictions on obtaining consumer information for such purposes under section 1681b.[11]

In short, the Ninth Circuit's redefinition of the term "willfully" in section 1681n will affect a vast array of entities and all of FCRA's numerous requirements, and hence amply justifies review by the Court.

---

[9] See FTC Staff Letter from William Haynes to Matthew B. Halpern (June 11, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/halpern.htm.

[10] See *Yang v. GEICO*, 146 F.3d 1320 (11th Cir. 1998).

[11] See, *e.g.*, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006); *Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053 (N.D. Cal. 2006); *Pearson v. Novastar Home Mortgage, Inc.*, No. 05-1377-A, 2006 U.S. Dist. LEXIS 36282 (M.D. La. Mar. 28, 2006).

II. THE NINTH CIRCUIT'S DIVERGENT AND ERRONEOUS DECISION WILL CAUSE PROBLEMS ACROSS THE BROAD SWEEP OF ITS IMPACT

The Ninth Circuit's decision will not just sweep broadly; it will cut deep. It will, with respect to the Act's unresolved issues, promote forum shopping, skew and complicate compliance, and undermine the attorney-client privilege. Those impacts will be particularly pronounced because FCRA is, in fact, a complicated statute that presents many unresolved issues. And this pronounced effect is especially problematic because, as Congress found, the flow of consumer information is critical to the American economy, including the housing market—which is why the Act strikes a balance between business and consumer interests that the Ninth Circuit's ruling threatens to upset.

A. The Circuit Split Created by the Ninth Circuit Will Result in Forum Shopping and More Litigation, Skew Compliance, and Undermine the Attorney-Client Privilege

As noted above, mortgage insurers provide insurance on millions of mortgages nationwide. Absent prompt correction, the Ninth Circuit's acknowledged refusal to adopt the interpretation of FCRA reached by other Circuits will lead to extensive forum shopping and increased class action filings and will adversely affect efforts to comply with the statute.

The decision below threatens to make district courts in the Ninth Circuit the forums of choice for FCRA nationwide class actions. The ability to pursue claims for statutory and punitive damages dramatically increases the potential damages under FCRA; indeed, unlike other federal statutes such as the Truth in Lending Act and the Fair Debt Collection Practices Act, FCRA does not cap a defendant's liability in class actions. As such, the ruling below, by creating a lessened standard of proof for "willful" violations, will di-

rectly drive the calculus as to where plaintiffs will file suit. Because mortgage insurers carry out their activities on a nationwide basis, plaintiffs will have the opportunity to try to file their FCRA class action cases in the Ninth Circuit, thus avoiding the other circuit court decisions that apply a sensible reading of the key statutory term. Indeed, starting immediately after the Ninth Circuit's initial opinion, numerous FCRA class actions have been filed in the Ninth Circuit—including by residents of far-off jurisdictions such as Georgia and Tennessee.[12] Allowing the conflict created by the decision below to persist thus would give a green light to massive forum shopping. Moreover, by lowering the standard for statutory and punitive damages, the decision below likely will lead to a sharp increase in filing of new FCRA class actions, thereby raising costs and increasing artificial settlement pressures.

The ruling below will also skew the efforts of mortgage insurers to comply with FCRA, raising costs and discouraging the beneficial use of consumer information. As Congress has emphasized, FCRA "seeks to balance the needs of consumers and businesses" with respect to the use of consumer information. S. Rep. No. 103-209, at 2 (1993).[13]

---

[12] See *Luther v. 1-800-BAR-NONE*, No. 05 c 4026 (N.D. Cal. Oct. 5, 2005); *Hogan v. PMI Mortgage Ins. Corp.*, No. C05-3851 PJH (N.D. Cal. Sept. 23, 2005); *Holloway v. Homefield Fin. Inc.*, No. SACV 05-0861 (C.D. Cal. Sept. 6, 2005); *Phillips v. Accredited Home Lenders Holding Co.*, No. SACV 05-851 (C.D. Cal. Sept. 1, 2005); *Yeagley v. Wells Fargo & Co.*, No. C05-3403 CRB (N.D. Cal. Aug. 22, 2005); *Putkowski v. Irwin Home Equity Corp.*, No. C05-3289 PJH (N.D. Cal. Aug. 12, 2005).

[13] See also *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045–46 (7th Cir. 2005) (FCRA is an "attempt to achieve this balance between consumer privacy and the needs of a modern, credit-driven economy"); *Ladner v. Equifax Credit Info. Servs., Inc.*, 828 F. Supp. 427, 429 (S.D. Miss. 1993) (FCRA "legislat[es] a balance between the interest of the consumer public and that of financial institutions").

Given the severity of a potential class-action award of statutory and punitive damages if a company's position on an unresolved issue is determined in hindsight to have been "implausible," mortgage insurers, like other companies, will be pressured by the ruling to consider adopting an unnecessarily conservative reading of each of the Act's various requirements. Indeed, the Ninth Circuit's ruling will impose particular burdens on companies with nationwide or multistate operations, like MICA's members, because of the risk from nationwide class actions filed in the Ninth Circuit. It will be cold comfort to such businesses that other Circuits have held that statutory and punitive damages can be awarded only for knowing noncompliance with the Act's requirements. The fact that the Ninth Circuit's decision not only conflicts with, but as a practical matter will *nullify*, the rulings of other appellate courts underscores the urgent need for review by this Court.

Finally, the ruling below will undermine the attorney-client privilege and, in doing so, will weaken rather than enhance compliance with the Act's substantive requirements. As the Ninth Circuit unabashedly acknowledged, its "reckless disregard" standard will routinely put at issue "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." 435 F.3d at 1099. Indeed, given the risk of catastrophic statutory and punitive damages in nationwide class action cases, mortgage insurers and other defendants may, as a practical matter, feel it necessary to disclose the privileged advice they received in an effort to defend themselves. As such, the Ninth Circuit's approach contravenes the strong public interest in protecting attorney-client communications. See, *e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Moreover, by putting such advice routinely at issue, the ruling below will discourage clients from seeking, and lawyers from providing, frank and thoughtful advice with respect to FCRA compliance—lest such advice later be used against the

client as proof of the kind of "creative lawyering" that, under the Ninth Circuit's approach, justifies the imposition of exemplary damages on a defendant. Thus, rather than motivating companies to "seek objective answers from their counsel as to the true meaning of the statute" (435 F.3d at 1099), the decision below will undermine forthright legal advice and true compliance with the Act. Last, still further problems will arise from the Ninth Circuit's assertion (*id.*) that consultation with attorneys and reliance on their advice may not be sufficient to avoid a finding of willfulness if a court concludes in hindsight that the lawyers provided "indefensible answers." That holding places clients in the impossible situation of having to second-guess their attorneys—still further undermining both the privilege and compliance. It can safely be said that Congress never intended such an approach when it enacted section 1681n.

B. These Adverse Effects Will Be Particularly Pronounced Because FCRA Is a Complex Statute that Raises many Unresolved Issues

The Ninth Circuit's holding that a defendant can be held to have acted "willfully" if an appellate court finds its position on an unresolved FCRA issue be "implausible" will have a particularly powerful impact because FCRA is a complicated statute as to which industry has been given little regulatory guidance and which raises many still-unresolved issues.

FCRA is a "complex statutory scheme." *Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003). For example, as directly applicable to these cases, the term "adverse action" is given five separate meanings by the Act. 15 U.S.C. § 1681a(k). There is, moreover, relatively little guidance as to the proper interpretation or application of the Act's complicated provisions. The FTC, which has jurisdiction over certain of the Act's provisions, has no general authority to issue substantive rules under the Act (see 15 U.S.C.

§ 1681s(a)(1); 65 Fed. Reg. 80,802, 80,803 (Dec. 22, 2000)) and, since 2001, has not even issued informal interpretive letters (see http://www.ftc.gov/os/statutes/fcrajump.htm). Indeed, three years ago, Congress enacted the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, a lengthy statute that revised many of FCRA's existing provisions and added numerous new statutory terms, but many of the regulations that Congress required for implementing these new provisions have yet to be issued.

Not surprisingly, given the Act's complexity and limited guidance, numerous issues concerning the Act's interpretation and application remain unresolved. In the instant cases, for example, the Ninth Circuit considered, admittedly as a "matter of first impression," whether an initial insurance premium charge is properly considered an "increase in any charge" and hence can constitute an "adverse action." 435 F.3d at 1090. In ruling that it is, moreover, the court rejected multiple prior district court rulings, including in the case on appeal.[14] The Ninth Circuit also considered, again for the first time, whether an "adverse action" can have occurred when the use of credit information resulted in the consumer receiving a better rate than if credit information has not been considered at all. On this new issue, too, the appeals court rejected the district court's ruling. 435 F.3d at 1092–93.

Similarly, issues relating specifically to the Act's application to mortgage insurance remain unresolved under FCRA. For example, the duties that apply in the event of an "adverse action" depend in part on which of the five prongs of the Act's "adverse action" definition applies. 15 U.S.C. § 1681a(k). Mortgage insurance arises as part of a credit transaction: when a prospective homeowner seeks credit in the form of a mortgage, the lender as part of that credit transaction obtains mortgage insurance in order to insure against

---

[14] See, *e.g.*, *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003).

the risk it would face if the borrower defaults on a loan and the value of the collateral is insufficient to pay the amount of the outstanding indebtedness. Because mortgage insurance, thus, is an integral part of a transaction in which a consumer is obtaining credit, MICA believes that the so-called "credit" prong applies. *Id.* § 1681a(k)(1)(A). Advocates in cases against MICA's members have argued, however, that the definition of adverse action applicable to the "underwriting of insurance" instead applies. *Id.* § 1681a(k)(1)(B)(i). This unresolved question is crucial; if the credit transaction definition applies, a mortgage insurer is not required to send adverse action notices in circumstances where the consumer obtains the product (a loan) that he or she sought. See 16 C.F.R. pt. 698, app. H, § I.C ("No adverse action occurs in a credit transaction where the creditor makes a counteroffer that is accepted by the consumer.").

Another area of uncertainty concerns whether adverse action notice requirements even apply to mortgage insurers. A federal district court has ruled that mortgage insurers have no duty to send adverse action notices to consumers because mortgage insurers contract with lenders, not consumers, and because they insure lenders' risks, not consumers' risks. *Whitfield v. Radian Guar., Inc.*, 395 F. Supp. 2d 234 (E.D. Pa. 2005), *appeal pending*, No. 05-5017 (3d Cir.). An older, non-binding FTC staff letter disagrees. FTC Staff Letter from Clarke W. Brinckerhoff to Paul H. Schieber at n.1 (Mar. 3, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/schieber.htm.

In short, the Ninth Circuit's adoption of a standard that invites an award of massive statutory and punitive damages for wrong answers to open FCRA issues is particularly pernicious because there are so many open issues under the Act. Immediate correction of that standard is therefore all the more important.

C. These Pronounced Adverse Effects Are Especially Problematic Because the Efficient Flow of Consumer Information Is Vital to the Economy, Including the Housing Industry

The recent widespread advances in technology have dramatically affected the consumer reporting industry.[15] Because of the computerization of records, development of the internet, and ability to transmit data electronically, entities that maintain information about consumer accounts now are able to quickly provide reporting agencies with considerable amounts of information, and entities whose operations are enhanced through the use of consumer information now are able to access it on a timely basis.[16]

This flow of consumer information is vital to the United States economy. In passing FCRA, Congress found that our "banking system is dependent upon fair and accurate credit reporting." 15 U.S.C. § 1681(a)(1). It further found that consumer reporting agencies "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." *Id.* § 1681(a)(3). Indeed, this Court has found that "Congress enacted the FCRA in 1970 to," *inter alia*, "promote efficiency in the Nation's banking system * * *." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

FCRA facilitates and encourages the efficient flow of consumer information in multiple ways. Congress authorized disclosure by consumer reporting agencies of consumer

---

[15] S. Rep. No. 104-185, at 18 (1995) ("the credit reporting industry has grown in the wake of information technology advances that have occurred over the last twenty years").

[16] Robert B. Avery et al., An Overview of Consumer Data and Credit Reporting, Federal Reserve Bulletin, at 49 (Feb. 2003), *available at* http://www.federalreserve.gov/pubs/bulletin/2003/0203lead.pdf (estimating that each consumer reporting agency receives more than two billion items of information each month).

information to various public and private entities in numerous circumstances. 15 U.S.C. § 1681b. It directed companies that maintain information about consumer accounts to furnish such information to consumer reporting agencies in an accurate manner. *Id.* § 1681s-2. Congress also preempted state laws that interfere with FCRA's key provisions. *Id.* § 1681t(b).

The nationwide system created by Congress provides considerable benefits to business and consumers alike. The FTC has noted that "[t]his flow of information [permitted under FCRA] enables credit grantors and others to make more expeditious and accurate decisions, to the benefit of consumers."[17] Among the benefits conferred by the efficient sharing of consumer information are rapid qualification for mortgage, automobile, and retail credit; higher levels of home ownership; more accurate pricing of credit based on risk; and increased availability of non-mortgage credit for low-income households.[18] According to Congress, these benefits have saved consumers as much as $100 billion annually.[19]

In sum, by establishing a standard for punitive damages that will adversely effect the efficient flow of consumer information on a nationwide basis, the Ninth Circuit's ruling undermines Congress's goal of promoting the efficient flow of such information in order to enhance the economy, including the promotion of homeownership. As shown above, FCRA seeks to balance consumer and business interests in the use of consumer information, and the Ninth Circuit's

---

[17] Federal Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, at 1 (Dec. 2004), *available at* http://www.ftc.gov/reports/facta/041209factrpt.pdf.

[18] H.R. Rep. No. 108-263, at 23 (2003).

[19] *Id.*

opinion threatens to upend that careful balance. The petitions for review should therefore be granted.

III. THE NINTH CIRCUIT'S ERRONEOUS "ADVERSE ACTION" RULINGS FURTHER WARRANT REVIEW

The need for review is even greater in light of the Ninth Circuit's erroneous reading of the Act's critical adverse action provisions, which will exacerbate the problems described above. First, the Ninth Circuit's conjured requirement that an adverse action notice must "describe the action" taken, "specify the effect of the action upon the consumer," and "identify the party or parties taking the action" (435 F.3d at 1095) is not just unsupported by the statutory text, it will also cause serious practical problems. In the mortgage insurance context, the *lender* decides whether mortgage insurance is needed, the amount of the insurance, whether and to what extent the borrower will be asked to pay the premium, and, in some instances, the rate at which the policy will be issued. Describing the action taken, and the effect on the consumer, in these circumstances could require a complex recitation about the nature of mortgage insurance, the relationship between the lender and the mortgage insurer, and the various mortgage insurance plans that MICA's members offer to mortgage lenders, in order to comply with the Ninth Circuit's new, vague directive. Separately, confusion will likely result if a consumer who has successfully obtained a mortgage loan is simultaneously told that he or she experienced "adverse" action and receives that notice from an entity (the mortgage insurer) with whom he or she has had no dealings of any kind.

Likewise, the Ninth Circuit's holding that adverse action occurs under section 1681m when "because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged" (435 F.3d at 1092) misconstrues the Act's plain language. If there was no

earlier charge, there simply cannot be said to have been "an increase in any charge" (15 U.S.C. § 1681a(k)(1)(B)(i)), and hence there is no adverse action. Likewise, where no credit information has been found, the subsequent pricing decision simply cannot be said to have been "based in whole or in part on any information contained in a consumer report" (*id.* § 1681m(a)), and hence no duties are triggered.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

THOMAS M. HEFFERON
Counsel of Record
RICHARD M. WYNER
JOSEPH F. YENOUSKAS
GOODWIN | PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
Tel: 202-346-4000

August 21, 2006